No. 05-823

In The
Supreme Court of the United States

MONTANA SPORTS SHOOTING ASSOCIATION, INC., GARY S. MARBUT, AND DR. PHILLIP BARNEY,

Petitioners,

v.

GALE A. NORTON, Secretary, United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; KATHLEEN CLARKE, Director, Bureau of Land Management; MAT MILLENBACH, Montana State Director Bureau of Land Management; and BRUCE W. REED, Field Manager, Malta Field Office, Bureau of Land Management,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, even though private defendants bear the formidable burden of proving that it is absolutely clear that the voluntary cessation of their illegal conduct moots a case, government officials bear no such burden when they voluntarily cease their illegal conduct, contrary to *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000), *relying on Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 165 (2000)?

LIST OF PARTIES

The caption of this case contains the names of all the parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Montana Shooting Sports Association, Inc. ("Montana Hunters") is a non-profit corporation. It has no parent or publicly held companies owning 10 percent or more of its stock. Its purpose is to support and promote firearm safety, shooting sports, and hunting.

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OPINIONS BELOW

Montana Hunters seek review of the Order of the U.S. Court of Appeals for the District of Columbia Circuit, entered June 14, 2005, granting Secretary Norton's Motion for Summary Affirmance of the District Court's Order dismissing this case as moot, reproduced at App. 1-2. Montana Hunters reproduce the D.C. Circuit's Order, entered September 28, 2005, denying their Petition for Rehearing *En Banc* at App. 7-8; and the Memorandum Opinion and Order of the U.S. District Court for the District of Columbia at App. 3-6. These Orders were not published.

JURISDICTION

Supreme Court Rule 13.3 and 28 U.S.C. § 1254(1) vest this Court with jurisdiction to review the Order for which Montana Hunters seek timely filed review.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article III, Section 2 of the United States Constitution:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority. . . .

STATUTORY PROVISIONS INVOLVED

Although, on the merits, this case involved various provisions of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, *et seq.*, and the Endangered Species Act (ESA), 16 U.S.C. §§ 1533, *et seq.*, it was dismissed as moot under Article III of the Constitution.

STATEMENT OF THE CASE

On October 18, 1999, the U.S. Department of the Interior, through the Bureau of Land Management (BLM) ("Interior"), without notice or opportunity for public comment, issued a Closure Order regarding 20,000 acres of public lands in Montana ("40 Complex") to the discharge or use of firearms, purportedly to protect habitat of black-footed ferrets, a non-essential experimental population of endangered species. App. 9-11. The use of the closed land is governed by the *Judith Valley Phillips Resource Area Resource Management Plan* (RMP), adopted pursuant to FLPMA, which allows for multiple uses, including, specifically, the discharge of firearms and sport shooting of prairie dogs. Nonetheless, Interior, relying on 43 C.F.R. § 8364.1, summarily, unilaterally, and illegally effected a *de facto* amendment to the RMP by closing 20,000 acres of land to the discharge of firearms.

Montana Hunters filed suit asserting that Interior's Closure Order violated both the public involvement provisions of FLPMA and the critical habitat provisions of the ESA. Montana Hunters sought a declaration that 43 C.F.R. § 8364.1 could not be used to circumvent FLPMA and the ESA, that any termination of uses allowed by an RMP must be accomplished in accordance with FLPMA,

and that any closure to such permitted uses to protect habitat must be done in accordance with the ESA.

On or about August 12, 2002, Montana Hunters filed a Motion for Summary Judgment. While that motion was pending, the State of Montana, through its Department of Fish, Wildlife & Parks (FWP), undertook to manage prairie dogs. App. 12. Thereupon, Montana FWP prohibited the shooting of prairie dogs in the 40 Complex. Interior then withdrew its Closure Order but expressly reserved the right to "implement a land closure . . . in accordance with 43 C.F.R. § 8364.1" in the event FWP determined to "rescind or significantly modify" its rule banning the shooting of prairie dogs. App. 13-15. The current Montana FWP ban expires in February 2006, unless reenacted.

Interior then moved to dismiss Montana Hunters' case as moot, or, in the alternative, for Summary Judgment on the merits, claiming that 42 C.F.R. § 8364.1 excused Interior from complying with FLPMA and the ESA. The District Court dismissed the case as moot, Montana Hunters appealed, and Interior filed a Motion for Summary Affirmance, which the U.S. Court of Appeals for the District of Columbia Circuit granted in a one-paragraph *per curiam* decision.

In its opinion, the D.C. Circuit declined to rely on *Laidlaw, supra* and on *Adarand, supra*, which set forth the burden imposed on private and governmental actors who seek to moot a case by the voluntary cessation of their illegal conduct. Instead, the D.C. Circuit applied *National*

Black Police Association v. District of Columbia,[1] ruling that the cessation of illegal conduct moots a case unless plaintiffs prove the illegal conduct is virtually certain to recur. Montana Hunters' motion for rehearing *en banc*, in which they brought the D.C. Circuit's attention to the conflict with this Court's *Laidlaw* and *Adarand* rulings, was denied.

REASONS FOR GRANTING THIS PETITION

I. THE D.C. CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S DECISIONS IN *LAIDLAW* AND *ADARAND*.

A. THE D.C. CIRCUIT IGNORED *LAIDLAW* AND *ADARAND*.

The D.C. Circuit failed to apply *Laidlaw*'s and *Adarand*'s stringent scrutiny of voluntary cessation of illegal conduct in a mootness claim, and ignored the formidable burden those rulings place on defendants to demonstrate that it is absolutely clear that the voluntary cessation of their illegal conduct will not be abandoned. Instead, ignoring *Laidlaw* and *Adarand*, the D.C. Circuit held that, when government is the defendant, mootness is presumed from the cessation itself. Thus, the D.C. Circuit required that Montana Hunters prove that it is virtually certain that such illegal conduct will again recur, rather than requiring Interior to prove that it is absolutely clear that its illegal conduct will not recur, as the D.C. Circuit, under *Laidlaw* and *Adarand*, is required to do. The D.C. Circuit, like the Fourth and Tenth Circuits, which were overruled

[1] 108 F.3d 346 (D.C. Cir. 1997).

by *Laidlaw* and *Adarand*, confused mootness with standing and made a distinction between governmental and private entities, a distinction specifically rejected by this Court in *Adarand*.

The D.C. Circuit relied exclusively on *National Black Police*, reciting therefrom: "The mere power to reenact a challenged law is not sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists."[2] Thus, *National Black Police* presumes mootness *per se* from the mere cessation of the government's illegal conduct, and erroneously places the burden of proving its likely recurrence on the plaintiff, holding: "[T]here must be evidence indicating that the challenged law likely will be reenacted."[3] Indeed, it held that "a statutory change . . . is usually enough to render a case moot . . . unless [plaintiff proves that] it is virtually certain that the repealed law will be reenacted."[4] The D.C. Circuit here, as it did in *National Black Police*, presumed that Interior's cessation of its challenged action rendered the case moot *per se* and imposed on Montana Hunters the heavy burden of proving that it is "virtually certain" that Interior will again issue its illegal Closure Order.

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[2] 108 F.3d at 349.

[3] *Id.* Moreover, this case, even if it survived *Laidlaw* and *Adarand*, is inapposite because it involved a change to legislation by a legislative body, with notice and opportunity for public comment, which is entirely dissimilar from the agency action taken unilaterally here by Interior.

[4] 108 F.3d at 349 (quoting from *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994).